

Sales that do not involve the transfer of tangible personal property are not subject to Retailers' Occupation Tax liability. See 86 Ill. Adm. Code 130.101. (This is a GIL).

November 24, 1999

Dear Mr. Xxxxx:

This letter is in response to your letter dated July 30, 1999. We apologize for the delay in responding to your inquiry. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

I represent a New Jersey Corporation that will start utilizing independent contractors within your state, on or about October 1, 1999 to perform the services further detailed herein.

The independent contractors purchase territories within which they can represent our client. The territories are owned and operated by the independent contractor and are saleable. The contractor operates without supervision and can hire and fire his or her employees. These contractors can represent other companies and can operate in any form of legal entity.

Based on the above, and the facts represented herein, I would like to know if our client is considered to be doing business in your state and has to register for authorization to do so and whether or not the services provided are subject to any other applicable taxes, i.e. sales tax, income tax, corporation tax, etc.

The services provided are as follows:

The taxpayer supplies the consumer with a directory of merchants that honor a discount program. Membership in this discount program is evidenced by a card that has my clients name on it. The consumer obtains a discount or in kind gifts from the merchant, telephone time on a prepaid card, and eligibility to be in a monthly cash drawing.

My client bills the merchant for each time a consumer utilizes the program. The billing to the merchant is done electronically via an independent outside service. The transaction fee is determined based on the average dollar value of a sale, and is determined by the independent contractor. The independent contractor is paid a commission ranging between 40% and 45% of the billing to the merchant.

In order for a consumer to utilize the program, they must present their card which gets 'swiped' through a terminal machine that records

the usage and fees due from the merchant as well as the telephone time credits due the customer, and the entry into the cash sweepstakes drawing.

My client mails the merchant directory and the membership card to the consumers utilizing an outside mailing service.

The independent contractor purchases a territory or territories identified by zip code and priced based on the residential population of the designated zip code. The independent contractor must solicit the merchants within the given territory to subscribe to this promotional plan.

I trust that the above adequately describes the business/service provided by my client within your state; however, should you have any questions, please feel free to contact the undersigned.

Please note that the Department can only provide you with general information regarding Illinois tax laws and not whether your client can otherwise do business in this State. A copy of your letter has been given to our Income Tax Division for a response regarding any potential Income Tax issues.

The Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq. (1996 State Bar Edition), imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See the enclosed copy of 86 Ill. Adm. Code 130.101. If no tangible personal property is being sold, then no Retailers' Occupation Tax will apply. Even if a charge is made for being a member of the discount program, sales of discount cards or memberships in discount programs, which enable purchasers to take advantage of exclusive discounts, are not generally considered sales of tangible personal property and therefore are not subject to Retailers' Occupation Tax liability in Illinois. This is the case when the sale of membership rights does not include the transfer of tangible personal property.

Please note that a person or business that gives away items of tangible personal property in Illinois is making a taxable use of that property and incurs a Use Tax liability on the cost price of such property. See subsection (c) of the enclosed copy of 86 Ill. Adm. Code 150.305. Persons or businesses that give away items in this State, such as printed directories or membership cards, are thus making a taxable use of that property and incur a Use Tax liability on the cost price of those directories and membership cards.

The sale of a right to engage in a business within a specific territory in this State is not generally considered a sale of tangible personal property. Likewise, a payment from a merchant to a discount program provider, that is contractually required as a result of a customer of that discount program making a purchase from that merchant, also is not generally considered a sale of tangible personal property.

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Your letter states that consumers also obtain telephone time on a prepaid card. Without specific information regarding the nature of these transactions, we cannot provide you with guidance on the manner in which these transactions may be taxed. For your information, we have enclosed our regulations governing the Telecommunications Excise Tax Act. See the enclosed copies of 86 Ill. Adm. Code 495.100 through 495.130.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk
Enc.